DOCUMENT RESUME

ED 290 690 SO 018 828

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TITLE Land and Liberty: The Ordinances of the 1780s.
PUB DATE 87
NOTE 13p.; For related documents, see SO 018 835-36.
PUB TYPE Historical Materials (060)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Civil Rights; Governance; Government (Administrative Body); Land Acquisition; Land Settlement; Land Use; *Social Studies; State Government; *United States History
IDENTIFIERS *Bicentennial; *Northwest Ordinance 1787; Northwest Territories

ABSTRACT

The U.S. Constitution established the broad legal frame for the U.S. political order; the ordinances provided the indispensable means for the expansion of that order across the continent. The first effort at organizing the northwest occurred in 1784. Written by Thomas Jefferson, the Ordinance of 1784 defined the stages through which territories should pass to statehood, made membership in the confederation perpetual, outlawed slavery, and required that state governments should be republican. The Land Ordinance of 1785 solved the problem of the orderly distribution of land. The Northwest Ordinance, enacted by Congress on July 13, 1787, contained machinery for state making and the Articles of Compact. Provisions assuring freedom of religion, trial by jury, habeas corpus, security of property and contract, proportional representation, public support of education, and the exclusion of slavery from the northwest in the territorial stage were included in the Articles of Compact. The ordinance required that "utmost good faith" should be shown toward the Indians. Their property was not be taken without their consent, and laws were to be passed to prevent injustices and to preserve the peace. (SM)

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Bernard W. Sheehan

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Land and Liberty: The Ordinances of the 1780s

by Bernard W. Sheehan

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This is the first in a series of articles commemorating the 200th anniversary of the Northwest Ordinance and the U. S. Constitution. The second in this series, by James Madison, will highlight the Northwest Ordinance and its impact on slavery and the state of Indiana; in the third, Maurice Baxter will consider the origins of individual rights as expressed in the Constitution and the Bill of Rights.

The 13 colonies that splintered the British empire in the 1770s clung rather precariously to a strip of lightly settled land between the Atlantic Ocean and the rim of the Appalachian mountains. In the immediate aftermath of the Revolution, they scarcely appeared to be the seedlings of a continental empire, although the territorial beginnings of that empire had been acquired at the Peace of Paris that concluded the War for Independence. As a consequence of the rivalries of the European powers, the new nation obtained a western border at the Mississippi River, a good deal beyond the actual reach of its power. In subsequent decades it was to extend its jurisdiction to the Pacific. But in the 1780s the immediate issue, the solution to which would make possible the creation of a great continental power, was to provide for the settlement and legal organization of the lands west of the Appalachians.

The desire for expansion

In the early 1760s, at the outset of the dispute that would in a dozen years lead to independence, the British government had confronted the problem of restless American settlers who wished to move into the lands beyond the mountains. Wary of the expense of war with the Indians and eager to preserve the profitable fur trade, the king issued a proclamation designed to temporarily halt the movement of population. A decade later, on the eve of the Revolution, Parliament passed the Quebec Act which stretched the Canadian border to the Ohio, effectively

removing the Northwest from the jurisdiction of the colonies, a number of whom could claim part of the territory on the basis of their charters. After the collapse of British power, these claims persisted. In the early 1780s, the Articles of Confederation could go into effect only after Virginia, which made the broadest and most compelling claim, and the other states had yielded their title to western lands to the Confederation government.

Thus in the 1780s the new government faced some of the same imperial questions that had proved to be so vexing in the 1760s and '70s to successive British ministers. The lands in the Northwest territory had first to be cleared of native inhabitants. This task would not be complete until the early years of the 19th century. In the meantime, the persistent pressure of the frontier was to cause much grief for the Indians, leading to war, the gradual disintegration of native society, and a great deal of pain and expense for settlers and governmental authorities.

The "Savage" Frontier

There was no doubt, even during the period of British jurisdiction, that the Northwest territory would eventually be settled and that it would be organized politically and associated with the original 13 colonies and states. The questions concerned timing and political organization. The British had sought mainly delay but they wanted also to establish tighter control, for they had learned to distrust the

indiscipline of American frontiersmen. Politicians in the confederation period also doubted that settlement would occur quickly. In this they miscalculated badly. Like the British they tended to mistrust the unruly settlers. In the late 18th century, politicians who came from the settled regions east of the mountains found it easy to equate life on the frontier with the "savage" existence they thought characteristic of native life. Their solution as it turned out, replicated some of the experience of the imperial regime.

"An Empire of Liberty"

The first effort at organizing the Northwest came in 1784 from the pen of Thomas Jefferson. This Ordinance of 1784 provided for stages of political development in the territory by which new states would become part of the union. It has often been claimed that Jefferson's original plan was more democratic than the final version, because Jefferson failed to provide for close supervision of the territory in its early stages of organization. This absense of Confederation control over the territory was noted in the congressional debates and quickly remedied in a resolution for which Jefferson himself voted. In sober second thought, neither Jefferson nor his fellow legislators were, it seems, inclined to leave the frontier settlers to their own devices in the making of political order in the Northwest.

In its final form, the Ordinance of 1784 defined the stages through which territories should pass to statehood, made membership in the

confederation perpetual, outlawed slavery, and required that state governments should be republican. The heart of the Ordinance was the provision that the new states should be attached to the union with the same status as the original 13. Although plainly a decision of great significance (it in fact solved the problem of empire that had brought the British system to ruin), it was not a matter of dispute in the Congress. As early as 1778 it had been widely accepted as the method by which the new government should expand its jurisdiction into the West.

For Jefferson, the West raised deeper and more complicated problems. He was in time to become an ardent expansionist, but for now he saw in the West an opportunity to solve one of the great questions of 18th-century political science. He feared the consequences of Virginia's claim to vast stretches of territory in the West because he was convinced that republics could be successful only in the confines of a limited territory. Hence he did not favor the expansion of Virginia, but he did support the creation of many small republics (at least ten in his original plan) in the West that would be attached to the Confederation. In time, James Madison convinced him that republics would prosper in "an extended sphere" and Jefferson would soon speak of an "Empire of Liberty." Initially his vision was somewhat less sweeping. In the meantime James Monroe, another of Jefferson's political allies, made the case for the admission of fewer and larger states. He found it difficult to believe that the West would gain population very quickly and thus he feared that smaller territories would be slow in obtaining the numbers

necessary for admission. His argument for fewer and larger states won the day.

Dividing the Land

Monroe was certainly correct in his belief that the western lands were not yet prepared to join the Union. Provision had to be made for the orderly distribution of land. In this sense Jefferson's political Ordinance was premature. The Land Ordinance of 1785 solved the problem. It established a system for the survey and sale of western lands. Jefferson was by this time in Paris as the American minister, but his original conceptions remained a powerful influence. In keeping with the Enlightenment affection for clean lines and sharp angles, Jefferson had laid off the new western territories in rectangles. The new survey would employ the same design in microcosm, transforming indelibly the landscape of the Northwest states.

In contrast to the older states, that had been settled in the 17th and 18th centuries and whose internal boundaries had been allowed to conform to the contours and natural features of the land, the new states took form on a quite arbitrary rectilinear pattern. The surveyors laid out townships of six mile squares with boundaries running due east and west and north and south. Each township contained 36 sections, one mile

square, of 640 acres. One section was reserved to support education (provision to assign one section for the support of religion failed by a narrow vote), and land was to be set aside to compensate Continental soldiers.

After the land had been surveyed, the Congress intended that it should be sold to settlers at a dollar an acre in section lots. Unfortunately few settlers could raise $640 and the first sales were disappointing. Pressed for cash, the new government found it more convenient to sell large parcels to speculators who would then subdivide the land for sale to individual purchasers.

The Northwest Ordinance of 1787

After Jefferson's departure for France, Monroe took the leadership in formulating policy for the West. He remained in correspondence with Jefferson and in 1786 he toured the West, arriving home as something of an authority on the affairs of the frontier. Not only had the Ordinance of 1784 not been implemented but it had, in the intervening years, been subject to much revision. Besides the abandonment of Jefferson's early assumption that government would spring spontaneously from the people, which gave way to the principle that Congress should retain control throughout the territorial stage, agreement coalesced in favor of fewer states than Jefferson had planned. Far from seeing the retention of congressional supervision as contrary to the liberties of the people,

Monroe and his colleagues insisted that the new governments of the Northwest should be compatible with the republican political arrangements that had been obtained in the original 13 states.

The result was the Northwest Ordinance, enacted by Congress on July 13, 1787, just months before the new Constitution was adopted in Philadelphia. No fewer than three nor more than five states were to be carved out of the territory between the Ohio and Mississippi. Initially the territory was to be governed by a governor and judges appointed by Congress. When 5,000 free adult males were resident in a district of the territory, the governor was authorized to call a bicameral legislature. When the population reached 60,000 free inhabitants, the territory could join the Union "on an equal footing with the original States in all respects whatever."

The origins of individual rights

Besides this machinery for state making, the Ordinance contained Articles of Compact that read like the Bill of Rights which was later attached to the Constitution. This section, probably the work of Nathan Dane of Massachusetts (at least in later years he took credit for it), contained provisions assuring freedom of religion, trial by jury, habeas corpus, security of property and contract, proportional representation, and public support of education.

The Ordinance also recapitulated English law governing the conveyance and descent of property that seemed to many observers out of place in a

document of compact. These articles reflected Dane's passion for the law and his expectation that the West would be settled by people unfamiliar with the rules of common law and lacking deep loyalties to the spirit of Anglo-American liberty.

The issue of slavery in 1787

The Ordinance excluded slavery from the Northwest in the territorial stage, a provision that could not have been a surprise since Jefferson had included it in his 1784 plan. It had, in fact, been dropped in the intervening discussions and did not appear in the early drafts of the 1787 Ordinance. It was added at the last minute, probably by Dane, and attached to the Ordinance with little discussion or dissent. Language in the Ordinance, reference, for example, to "free" inhabitants in the stipulations on representation, remained inconsistent with the antislavery article. Later, of course, in the period before the Civil War, when slavery erupted as a major issue, it was to have great significance, for it established the precedent that Congress should have jurisdiction over slavery in the territories.

In the 1780s that fissure between North and South was only beginning to appear. It seems likely that the southern representatives acquiesced in the provision because they expected that slavery would be permitted in the western territories that would soon be organized south of the Ohio. In fact, that is precisely what happened. After the new

Constitution came into effect, Congress passed an ordinance for the Southwest identical to the Northwest Ordinance except that it permitted slavery.

Settlers vs. Indians

In the third of the Compact articles the authors of the Ordinance accosted perhaps the most sensitive issue in the settlement of the West: occupation of the new territory could occur only at the expense of the native peoples. The settlers themselves, having engaged in many decades of vicious frontier conflict with the Indian warriors, were of one mind on the subject. They cared little for Indian rights generally and none when they conflicted with their own claims to a homestead in the new territory. But the congressional representatives who made the Ordinance faced larger issues. For practical reasons, largely expense, they perceived the need to formulate a broad policy for conciliating the tribes. Also they were for the most part from the East where memories of Indian wars had faded, sympathy for unruly frontiersmen was limited, and humanitarian sentiment required that the native peoples be treated with justice, though justice did not include a permanent native presense in the Northwest territory.

This new policy, first enunciated in the Ordinance and then adopted under the new Constitution, required that "utmost good faith" should

always be shown toward the Indians. Their property should not be taken without their consent, and laws should be passed to prevent wrongs being done to them and to preserve the peace. The statement implied the opposition of the frontier population, and in the ensuing years the government proved that it lacked both the capacity and the will to impose such a policy.

The Northwest Ordinance was above all a political document thrashed out over some three years and designed to satisfy a number of constituencies. Frontier farmers, town builders, land speculators, politicians with sectional interests, all left their mark on the document. Yet it also drew heavily on the Anglo-American legal tradition and the idealism of the American Revolution that culminated in 1789 with the formation of the new government. The Constitution established the broad legal frame for the American political order; the Ordinances provided the indispensable means for the expansion of that order across the continent.